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No. 99-1708

IN THE SUPREME COURT
OF THE
UNITED STATES

HILLCREST DEVELOPMENT,
a California Limited Partnership,
Petitioner,
vs.
COUNTY OF RIVERSIDE, a Public Entity;
R. WAYNE WATTS, Treasurer-Tax Collector
of the County of Riverside;
N.R.L.L., INC., a California Corporation;
SPAN, L.L.C., a Limited Liability Company,
Respondents.

Petition for Writ of Certiorari
To The Court of Appeal of California
Fourth District, Division Two

REPLY TO BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

WHERE NO ANTICIPATORY TAX RELIEF IS SOUGHT BY A PROPERTY OWNER, ARE A MUNICIPALITY AND ITS TAX COLLECTOR WHO DEPRIVED THE PROPERTY OWNER OF HIS REAL PROPERTY WITHOUT DUE PROCESS WHOLLY IMMUNE FROM SUIT UNDER 42 U.S.C. §1983 AS THE RESULT OF THE "PRINCIPLE OF COMITY" AND THE "TAX INJUNCTION ACT".

ARE PRIVATE PERSONS WHO PARTICIPATE WITH A MUNICIPALITY AND ITS TAX COLLECTOR IN THE DEPRIVATION OF REAL PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE WHOLLY IMMUNE FROM SUIT UNDER 42 U.S.C. §1983 AS A RESULT OF THE "PRINCIPLE OF COMITY" AND THE "TAX INJUNCTION ACT".

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1. INTRODUCTION

The respondents' Briefs in Opposition to the Petition of Hillcrest Development, Inc. ("Hillcrest Development") illustrate why this case should be decided by this Court, regardless of whether the underlying case was published. First, the issue of whether a civil rights action under Section 1983 (42 U.S.C. § 1983) may ever be maintained against a municipality and its tax collector in a tax related case is framed in simple terms because the issue was decided as a matter of law. After concluding that the trial court erred in granting summary judgment on the basis that the civil rights action was time barred, the California Court of Appeal stated:

> "The error, however was harmless. Defendants were entitled to summary judgment in any event, because section 1983 does not afford a remedy for allegedly unconstitutional state taxation." Opinion, page 3 [Petitioner's Appendix, page A-3].

Second, the case involves an issue of national importance, i.e., whether Mennonite Board of Missions v. Adams, 462 U.S. 791, 800 (1983), has been effectively overruled by Fair Assessment in Real Estate Ass'n., Inc. v. McNary, 454 U.S. 100 (1981), and whether a property owner is barred from any civil rights action where taxes might be tangentially involved. Third, the California Supreme Court **published** case of Quelimane Co., Inc. v. Stewart Title Guaranty Co., 19 Cal.4th 26 (1998), cited by Respondents N.R.L.L. and SPAN ("N.R.L.L." and "SPAN") in opposition at page 5 of their Brief suggests a disinclination on the part of the highest court in California to even consider a case in which a tax deed is challenged on due process grounds. Fourth, the respondents fail to even discuss or distinguish this Court's decision in Jefferson County, Ala., v. Acker, 527 U.S. 423

(1999), as to the meaning and limitation of the Tax Injunction Act.

2. THE NONPUBLICATION OF THE DECISION BY THE CALIFORNIA COURT OF APPEAL SHOULD NOT EFFECT THE REVIEW BECAUSE OF THE IMPORTANCE OF THE ISSUES RAISED AND THE FACT THAT THE DECISION AFFECTS THE CONDUCT OF A PUBLIC AGENCY

Unlike a case involving private parties, this case involves the County of Riverside, a municipality and its Tax Collector whose conduct affects a county of in excess of a million people. The County of Riverside and the Tax Collector have convinced a panel of the Division of the Court of Appeal which hears all of the Riverside appeals that they are not subject to a Section 1983 action whenever the conduct has some effect upon tax administration. Though the Tax Collector and the County of Riverside might not be able to cite the case in any subsequent case [other than for the ostensible purpose to show good faith, etc], they will be free to show a copy of the "unpublished" decision to any property owner [or the owner's counsel] who asserts that his or her constitutional rights were violated and point out that the case will be reviewed by a panel of the same division that decided this case. They will also point out that review by the California Supreme Court has been denied. The "chilling effect" on the property owner and counsel to then bring a civil rights action is obvious.

3. THE RESPONDENTS IN THEIR BRIEFS MISCHARACTERIZE THE FACTS AND THE PROCEDURAL ASPECT OF THE CASE

In their Briefs in Opposition to Hillcrest Development's Petition, respondents mischaracterize some of the facts and the nature of the action brought by Hillcrest Development. It is true, as stated by the respondents and acknowledged by Hillcrest Development, that Hillcrest Development was in default of its taxes through a comedy of errors. As to the post-1993 notices sent by the Tax Collector to Hillcrest Development, including the notices of the tax sale, the notices were returned to the Tax Collector. Even though the Tax Collector had the name of the general partner of Hillcrest Development, knew that Hillcrest Development and the general partner were officed in Orange County, California, which was the adjoining county to the County of Riverside, the Tax Collector failed to check the Orange County phone directory for the general partner, whose number was listed, or the Orange County Fictitious Business Name Statement of Hillcrest Development, which would have disclosed the current address and phone number of the general partner and Hillcrest Development. Numerous other documents would have disclosed such information and that is why the trial judge and the Court of Appeal assumed for purposes of the Motion for Summary Judgment that Hillcrest Development had alleged sufficient facts to support its claim under 42 U.S.C. §1983.

In their Brief, all of the respondents referred to an October 15, 1996 letter to Hillcrest Development from Nelson-Brown Equities, Inc., a private asset locator firm ("Nelson"). Respondents suggest that Hillcrest Development waited a year to bring an action after receiving a letter from Nelson concerning excess proceeds from the tax sale. The action was

brought less than one year of the date of the letter, and the letter did not disclose that the proceeds were from a "tax sale". When Nelson first contacted Hillcrest Development, Hillcrest Development called the County of Riverside, because Hillcrest Development's building project was only in Riverside, to see if there was any funds due it from the County. Hillcrest Development believed that if there were proceeds due it, they might have been due as a result of its development obligations to the County of Riverside, who required it to transfer property for easements and to pay for sewer improvements that benefitted other property owners. Such property owners would have to reimburse the costs once they developed their property.

After the records were reviewed by the County of Riverside, Hillcrest Development was told by county employees that no proceeds were due it. When the general partner did receive the October 15, 1996 Nelson letter, he did not understand that the proceeds were from a tax sale. He learned of the tax sale in September of 1997 and within a month brought this action. If the October 15, 1996 letter placed Hillcrest Development on notice, its civil rights action was still timely in that it was brought within one year of the date of the letter.

As to the statement of N.R.L.L. and SPAN at page 2 of their Brief that no evidence was produced as to their involvement in the constitutional violation, no evidence could have been introduced because there was no trial, and the issue of whether the pleadings were sufficient was not the subject of the County of Riverside and Tax Collector's Motion for Summary Judgment. N.R.L.L and SPAN simply joined in the Motion for Summary Judgment, which was granted based upon the conclusion of the trial court that the civil rights action was barred under Section 3725 of the California Revenue & Taxation Code. Petitioner's Appendix, page A-26.

As to the claim of N.R.L.L. and SPAN that they were not a party in the civil rights action, their assertion is incorrect. The quiet title action and the declaratory relief action to invalidate the tax deed incorporated by reference the civil rights action which was the basis for the action against all of the parties. In the civil rights action itself, all of the prior allegations as against all of the defendants were incorporated by reference. Not until they filed their Appeal Brief did N.R.L.L and SPAN raise the issue as to whether a private party had liability under the civil rights action, an issue not addressed by the Court of Appeal.

In their Brief at page 2 (fn. 2.), the County of Riverside and Tax Collector state that: "The Court never decided the issue of due process because Hillcrest failed to take advantage of their legal remedy, a suit to invalidate the tax sale." Not so. As stated by the Court of Appeal, "Hillcrest filed this action to set aside the tax sale." Opinion [Appendix, A-2, Petition]. The reason the Court of Appeal refused to consider Hillcrest Development's claim was because it concluded that this Court's decision in Fair Assessment, supra, barred a civil rights action in all state tax cases where the state provided a procedure for a tax refund. [Appendix, A-22]

4. THE CLAIM OF N.R.L.L. AND SPAN IN THEIR BRIEF THAT HILLCREST DEVELOPMENT DID NOT CHALLENGE A PORTION OF THE JUDGMENT IN FAVOR OF N.R.L.L. AND SPAN IS INCORRECT

In that Hillcrest sought to invalidate the tax deeds based upon its lack of notice of the tax sale, the claim by N.R.L.L. and SPAN at page 3 of its Brief that "Hillcrest does not challenge that portion of the judgment entered in favor of NRLL

and SPAN" is nonsensical. As stated by the Court of Appeal, "the issues on which we ultimately resolve this appeal are essentially identical with respect to all defendants." Appendix, A-8. Hillcrest appealed from the entire judgment in favor of all of the defendants. Petitioner's Appendix, A-7 - A-8.

As to the claim that the elements are missing for a civil rights violation against a private party, such claim is untrue, was not raised as part of the Summary Judgment Motion, and was not an issue decided by the Court of Appeal. N.R.L.L. and SPAN were defendants in the state action because they acquired the real property at the invalid tax sale as set forth in the Complaint of Hillcrest Development. As recognized in Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982), a private person may be sued when he is a participant in the state action which results in the deprivation of the property of another. See, also, Mennonite, supra.

5. THOUGH THERE WAS NO EVIDENCE THAT A CIVIL RIGHTS ACTION WOULD HAVE ANY IMPACT ON TAX SALES, ITS EFFECT, IF ANY, WOULD NOT BAR RELIEF

As did the Court of Appeal in its Opinion, the County of Riverside and Tax Collector state that granting relief to Hillcrest Development would have a "chilling effect" on tax administration. None of the respondents submitted any evidence that the availability of a civil rights action would have any significant effect on the ability of the Tax Collector to sell real property at tax sales. In all likelihood, there is no such evidence in that Mennonite was decided over 26 years ago without any reported catastrophe. This is either due to general compliance by tax authorities with Mennonite or the fact that purchasers at tax sales are willing to take the risk of the setting

aside of their deeds when they buy, as did N.R.L.L., property at an 85% discount to value.

6. CALIFORNIA HAS NO ADEQUATE REMEDY WHERE AN OWNER HAS BEEN DEPRIVED OF ITS REAL PROPERTY WITHOUT DUE PROCESS

The County of Riverside and Tax Collector parrot the statement of the Court of Appeal that Hillcrest Development did not question the adequacy of the remedy under California Law. Hillcrest Development did not question the adequacy of the remedy of California law as to a tax refund because it was not seeking a refund. As to property owners who do not get notice in order to file a timely action, the California system provides no remedy because California's statute of limitations with respect to the validity of a tax deed commences when the tax deed is recorded rather than when the notice is provided to the property owner. Adequacy of remedy is also irrelevant with respect to a civil rights action when the aggrieved property owner is not seeking anticipatory relief against a state tax. Where, as here, the aggrieved property owner seeks only the return of his real property or damages resulting from its deprivation of property without due process, its right to bring suit under the Civil Rights Act is not affected by the "Tax Injunction Act" or principle of comity because the court, in determining subject matter jurisdiction under Section 1983 must first determine if the plaintiff is seeking to invalidate a tax. See, e.g., Kerns v. Dukes, 153 F.3d 96, 100 (3d Cir. 1998). Only after determining that the plaintiff is seeking to invalidate a tax or seek damages for the imposition of what are alleged to be wrongful taxes (Fair Assessment, supra) does the issue of the adequacy of damages come into play. This is what Hillcrest Development argued to the Court of Appeal, who concluded

that subject matter jurisdiction never lies under Section 1983 when the action has any potential effect on tax administration. In that a refund action would not provide a full hearing of the constitutional issues to a property owner who has been deprived of its property without due process, the remedy would not be adequate as a matter of law. See, Rosewell v. LaSalle Nat. Bank, 450 U.S. 503, 514-516 (1981). The Court of Appeal denied Hillcrest Development its right to have the constitutional issues adjudicated.

7. THE CONCEPT OF A STATUTE OF LIMITATIONS WITHIN A STATUTE OF LIMITATIONS IS CONTRARY TO THE UNIFORMITY REQUIRED BY *WILSON v. GARCIA* IN DETERMINING WHAT STATUTE OF LIMITATIONS APPLIES

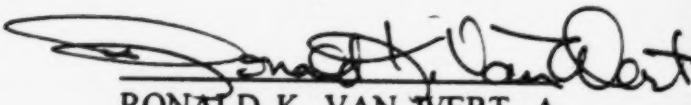
As to the timeliness issue, there is a suggestion by the Court of Appeal and argument by the County of Riverside and Tax Collector that there is a statute within the statute of limitations applicable to civil rights, i.e., if discovery of notice occurs prior to the running of the most analogous state statute of limitations, then the civil rights statute of limitation does not apply. If their argument was adopted, a property owner, who through happenstance learned of a tax sale within a short period of the running of a statute of limitations which is not applicable to a civil rights action, would be barred from bringing his civil rights action, whether the notice was a little more than five months [as asserted in this case, even though the fact was disputed], one month or one day. This lack of uncertainty as to what statute of limitations applies to a civil rights action is why this Court required in Wilson v. Garcia, 471 U.S. 261 (1985), national uniformity as to what state statute of limitations applies to civil rights actions, i.e., the state personal injury statute of

limitations. Hillcrest Development satisfied both the personal injury statute of limitations and the federal accrual rule, even if the Nelson letter started the statute of limitations. Hillcrest Development was entitled to bring its civil rights action within one year of when it received notice. It did so, whether it was charged with the notice when it received Nelson's letter or when its general partner saw the "for sale" sign on its property.

8. CONCLUSION

This case presents a serious challenge to the validity of Section 1983 actions in any civil rights case where a governmental agency or state officer might be involved in the tax process and in such process deprives a property owner of his property without Due Process. Petitioner respectfully requests this Court grant certiorari to review the decision of the California Court of Appeal.

Dated: June 1, 2000



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